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**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

MARCIANO PLATA, et al.,

*Plaintiffs*,

v.

ARNOLD SCHWARZENEGGER, et al.,

*Defendants*.

Case No. C01-1351 TEH

**RECEIVER'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR WAIVER OF STATE LAW RE CLINICAL COMPETENCY DETERMINATIONS**

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Receiver Robert Sillen submits this reply to the opposition of the State Personnel Board ("SPB") to the Receiver's motion for a waiver of State law regarding clinical competency determinations.

## INTRODUCTION

SPB's Response ("SPB Resp.") is noteworthy for its tone, particularly since SPB never once questions the underlying premise of the Receiver's Motion: *i.e.,* clinicians without privileges should not be permitted to practice in the prison medical system. In language draped in feigned shock and outrage, SPB seeks to create the impression that the entire State civil service system hangs in the balance as a result of the Receiver's Motion. But that impression is false. The sky is not falling; no one's hair is on fire.

The Receiver suspects that SPB has resorted to hyperbole because it cannot – and does not – dispute that the ranks of prison doctors include some who have no business being there, but who are effectively guaranteed employment at exorbitant cost to the State and at great risk to patient inmates. The existing system of "peer review" is ineffectual and unable to weed out the incompetent; again, SPB does not say otherwise. Instead, SPB repeats the words "due process," as if they are a mantra that, chanted often enough, will hypnotize the Court and thereby obscure the reality that the system, as currently constituted, perpetuates incompetence. Frankly, the failures in the current system are so manifest, and the Receiver's proposal is such a sensible response to those failures, that it is difficult to understand why SPB is so opposed.

Whatever the source of SPB's opposition, its arguments rest upon a number of faulty and misleading premises. First, SPB contends that its authority to review employee disciplinary appeals is "plenary," "sole and exclusive," and required in the "first instance." This is just incorrect. The California constitution provides for "review" of disciplinary decisions by SPB as a constitutional floor; it does not prescribe the form, content or procedure necessary for that review. Instead, the framework for the civil service disciplinary system is statutory and regulatory; and it is only certain of those statutes and regulations that the Receiver requests to be waived. Nor does the Receiver intend to divest SPB of its authority to conduct ultimate and

meaningful review of disciplinary determinations. The Receiver's Motion reveals that his proposal specifically provides for SPB review of decisions to discipline, or terminate the employment of, clinicians.

Second, SPB argues not only that its procedures alone are required to satisfy constitutional due process, but that its procedures are best suited to adjudicate claims of clinical incompetence. The Receiver begs to differ. No one can seriously dispute that the Receiver's proposal is designed to, and does, merge the existing, flawed two-track system into a single, more streamlined, and more effective process. As the Union of American Physicians and Dentists ("UAPD"), which represents CDCR clinicians, has said, the Receiver's proposal is a "significant improvement" over the existing system and more than meets constitutional requirements. And the Receiver's procedure does so in a manner that incorporates an effective peer review process.

Finally, SPB's "less intrusive" alternative to the Receiver's proposal is not an alternative. SPB gives lip service to incorporating peer review into its procedures, but in reality, SPB contends that it, and it alone, should decide whether clinicians in California prisons should retain their privileges to practice medicine. Thus, SPB's "alternative" does nothing other than enshrine the current practice that permits physicians determined by a peer review committee to be incompetent to continue working in the prisons.

As discussed in his Motion and below, the Receiver has crafted a procedure which assures the delivery of competent care to patient/inmates while protecting the caregiver's property interest in his/her job. The Court should grant the Receiver's Motion and approve his peer review procedures.

## ARGUMENT

### A. SPB's Sweeping Generalizations About The Scope Of Its Authority Have Been Manufactured Largely Out Of Whole Cloth.

SPB commences its opposition brief by gravely pronouncing that the Receiver's Motion "undermines key provisions of the California Constitution, as well as recent California Supreme

Court precedent, establishing that SPB *must* review, in the first instance, state-employee discipline. *See* Cal. Const. Art. VII, § 3, subd. (a); *State Personnel Board v. Department of Personnel Administration*, 37 Cal.4th 512 (2005)." SPB Resp., pp.1:26-2:2 (emphasis in original). According to SPB, its review must be "plenary" and "sole and exclusive;" therefore, it decries what it calls the Receiver's effort to limit it "to a perfunctory appellate function." Id., pp. 2:22-23, 4:24.

In fact, there is a good deal less here than meets the eye. The Receiver has not requested a waiver of the provisions of the California constitution applicable to SPB's review of disciplinary actions, and for good reason. SPB's authority under the State constitution is not nearly as expansive as SPB would have the Court believe and, thus, there is no need for a waiver of that authority. To the contrary, the Receiver's proposal expressly acknowledges and accepts the full extent of SPB's *constitutional* reach. The provisions of California law that are impeding the Receiver's efforts to enforce real peer review in the California prisons are statutory and regulatory only. It is those statutes and regulations that the Receiver requests that this Court waive and then, primarily only insofar as those statutes and regulations govern disciplinary hearings before Administrative Law Judges ("ALJs") employed by SPB. Motion, pp. 20-21.[1]

**1. SPB review of employee disciplinary actions is not "exclusive," and is subject to regulation by the State Legislature.**

SPB is governed by article VII of the California constitution. That provision has its origins in a movement during the 1930s to eliminate the political "spoils system" that dominated the civil service in the early years of the twentieth century. The result of that movement was an amendment to the 1934 constitution that added former article XXIV and established the current state civil service system, including SPB itself. *See generally Pacific Legal Foundation v. Brown*, 29 Cal.3d 168, 181-183 (1981). Despite some wording changes, article VII is the direct

[1] As SPB has previously conceded, this Court could waive provisions of the California constitution if necessary to protect the federal constitutional rights of inmate/patients. *See* Response Of State Personnel Board To Receiver's Amended Motion For Waiver Of State Law Re Receiver Career Executive Assignments, filed May 9, 2007, p. 10; Response Of State Personnel Board To Receiver's Master Waiver Application, filed May 15, 2007, p. 7:9-11. As discussed in this Reply, however, the Court need not go that far.

lineal descendant of former article XXIV. *Id.* at 183-184 and n.8. According to the California supreme court, the "sole aim" of article VII, like its predecessor provision in the 1934 constitution, is "to establish, as a constitutional mandate, the principle that appointments and promotions in state service be made solely on the basis of merit." *Id.* at 183-184.

Section 3(a) of article VII, upon which SPB rests so much of its argument, provides in full as follows:

> The [State Personnel] board shall enforce the civil service statutes and, by a majority vote of its members, shall prescribe probationary periods and classifications, adopt other rules authorized by statute, and review disciplinary actions.

This provision is not strong enough to carry the load SPB has thrust upon it.

By its terms, section 3(a) states that a primary duty of SPB is to enforce civil service legislation enacted by the Legislature. Indeed, based on the historical derivation of section 3(a), the California Constitution Revision Commission understood and intended that the Legislature would be the source for the substantive and procedural content of SPB's review of employee discipline. Section 3 of former XXIV provided as follows:

> [SPB] shall administer and enforce, and is vested with all of the powers, duties, purposes, functions, and jurisdiction which are now or hereafter may be vested in any state officer or agency under . . . any and all . . . laws relating to the civil service as said laws may now exist or may hereafter be enacted, amended or repealed by the Legislature.

Exhibit 1 to Request for Judicial Notice, filed herewith, p. 112.[2]

The drafters of current section 3(a) stated that the "first clause [of section 3(a)] is a *restatement without change* of the meaning of [former] Section 3." Id. (emphasis added). Accordingly, article VII, "having established a nonpartisan Personnel Board to administer [the] merit principle, the constitutional provision left the Legislature with a 'free hand' to fashion 'laws relating to personnel administration for the best interests of the State.'" *Pacific Legal*

[2] The ballot argument for the 1934 amendment states, in part: "'Having by constitutional mandate prohibited employment on any basis except merit and efficiency . . . the Legislature is given a free hand in setting up laws relating to personnel administration for the best interests of the State, including the setting up of causes of dismissal such as inefficiency, misconduct and lack of funds.'" *Pacific Legal Foundation*, *supra*, 29 Cal.3d at 183 (emphasis in original removed). *See also* Cal. Gov't Code § 19752 (setting forth grounds for dismissal).

*Foundation, supra*, 29 Cal.3d at 184. *See also California Correctional Peace Officers Ass'n v. State Personnel Board*, 10 Cal.4th 1133, 1152 (1995); *State Personnel Board v. Fair Employment and Housing Comm'n*, 39 Cal.3d 422, 436 (1985).

The Legislature has adopted numerous statutes providing for the rules pertaining to the investigation and adjudication of employee disciplinary cases, including the bases for discipline, the circumstances under which SPB may modify discipline, hearing procedures, time limits for appeal and decision and the like. *See, e.g.*, Cal. Gov't Code §§ 19572 – 19590. In addition, SPB is authorized by statute to adopt, and has adopted, rules of procedure that govern, for example, which appeals are entitled to evidentiary hearings before ALJs, the procedures for such hearings and which appeals can be dealt with administratively by SPB staff. Cal. Gov't Code § 18701; 2 Cal. Code Regs. §§ 51 – 54.

Most importantly, section 3(a) nowhere defines the nature and scope of SPB's "review" of disciplinary actions. That provision surely does not say that SPB must undertake "plenary" review, that such review is "sole and exclusive" or that it must be undertaken in the "first instance."[3] Instead, "[t]he apparent purpose of adding reference [in section 3(a)] to the Board's authority over appeals was *not* to limit the Legislature's power to establish civil service procedures, but *simply to ensure continuance of the employees' right to appeal to the Board*. . . . This [legislative] history refutes any suggestion that the inclusion of reference to the Board's power over employee appeals in the California Constitution was intended to limit the power of the Legislature to prescribe the procedures by which employee appeals were resolved." *California Correctional Peace Officers Ass'n, supra*, 10 Cal.4th at 1152-1153 (emphasis added).

Even under its own procedures, SPB does not hear employee appeals "in the first instance." SPB is authorized to, and does, delegate to ALJs the authority to hold evidentiary hearings on employee appeals. Cal. Gov't Code § 19582(a); 2 Cal. Code Regs. § 52. SPB has been authorized by the Legislature to, and does, limit its own role to adopting, rejecting or modifying proposed decisions prepared by such ALJs, and bases its decisions on the written

[3] It is worth noting in this regard that "review" is defined in *Black's Law Dictionary* (5th ed.) as "[t]o re-examine judicially or administratively. A reconsideration; second view or examination."

record of the proceedings before such ALJs. Cal. Gov't Code §§ 19582(b), (c). *See, e.g.* Exhs. 4 and 6 to Declaration of John Hagar ("Hagar Decl."), filed herewith.

In fact, directly contrary to SPB's contentions before this Court, the California supreme court has emphasized that SPB's "powers to review disciplinary actions . . . [are] *not* exclusive." *Fair Employment and Housing Comm'n, supra,* 39 Cal.3d at 441 (emphasis added). Courts have consistently rejected SPB's argument that its particular procedures are surrounded by an impenetrable constitutional wall. The Legislature is free to fashion remedial schemes to advance a variety of public policies even if, in so doing, those remedial schemes relate to some extent to SPB's sphere of influence. *See id.*, 39 Cal.3d 422 (rejecting SPB challenge to FEHC investigatory and adjudicatory role in preventing employment discrimination); *Pacific Legal Foundation, supra*, 29 Cal.3d 168 (upholding statutory scheme governing state employee collective bargaining, including creation of Public Employment Relations Board to adjudicate unfair labor practice claims). *See also California Correctional Peace Officers Ass'n, supra,* 10 Cal.4th 1133 (rejecting challenge to statute permitting State employee to challenge discipline in superior court if SPB does not act timely). By way of example, the State Public Employment Relations Board, Fair Employment and Housing Commission and Workers' Compensation Appeals Board are all State agencies with specialized expertise on which the Legislature – without running afoul of article VII, section 3(a) – has conferred adjudicatory authority over claims that may touch and concern State employee discipline. *Pacific Legal Foundation, supra*, 29 Cal.3d. at 198-199. The purposes behind such agencies are not inconsistent with, and may even further, the merit principle. *E.g., Id.* at 185-186; *Fair Employment and Housing Comm'n, supra*, 39 Cal.3d at 438-439.

If SPB's overly broad claims before this Court were the law, then all such State administrative bodies with the power to investigate and adjudicate issues that may involve State employee discipline would be unconstitutional. But the State supreme court has emphasized that "nothing in either the language or history of article VII, section 3, subdivision (a) suggests that in granting the State Personnel Board the power to 'review disciplinary actions' the drafters

intended thereby completely to preclude the Legislature from establishing other agencies whose specialized watchdog functions might also, in some cases, involve the consideration of such disciplinary action." *Id.*

To summarize, article VII, section 3(a) does not support SPB's contention that its review must be "plenary" or "sole and exclusive." Quite to the contrary, the nature and scope of SPB's review is subject to regulation by the Legislature. Other agencies with specialized expertise may, consistent with the State constitution, adjudicate claims that involve State employee discipline, especially where, as here, SPB retains ultimate and meaningful review.

**2. SPB has mischaracterized the holding in *Department of Personnel Administration v. State Personnel Board.***

Just as the SPB has overstated the reach of its constitutional authority, it has overstated the holding and significance of the decision in *Department of Personnel Administration, supra,* 37 Cal.4th 512, upon which it purports to rely.

In that case, the Legislature had permitted State employees to bargain collectively for private arbitration as an alternative and exclusive forum for challenging disciplinary actions, thereby bypassing SPB altogether. The California supreme court determined that the legislation was unconstitutional on the grounds that article VII, section 3(a) precluded the Legislature from enacting legislation that "*wholly* divest[s] the Board of its authority to review disciplinary action." *Id.* at 526 (emphasis added). Thus, the decision provides no assistance to SPB here for the simple reason that the Receiver does not propose to bypass SPB review. His proposal specifically preserves SPB's role in reviewing employment decisions, and presupposes that SPB's review will not differ procedurally from current practice. In other words, SPB will continue to review ALJ decisions based on the written record before it, just as it does now. Motion, p. 18:4-8.[4]

[4] The Receiver originally proposed that SPB's review should be limited to affirmance or reversal only of the employment decision. *See* Motion, p.13:7-10. The Receiver is willing to withdraw that portion of his proposal. It is important to underscore, however, that the Receiver still intends that any physician denied privileges will no longer be permitted to work as a physician at *CDCR*.

In apparent recognition that *Dept. of Personnel Administration* has, at best, only tangential bearing on the issues before this Court, SPB has mischaracterized the holding in that case. SPB states that the "California Supreme Court [in *Dept. of Personnel Administration*] expressly rejected alternatives to full SPB disciplinary review that would have narrowly limited the SPB's role to 'revoking' discipline or otherwise simply confirming arbitration awards." SPB Resp., p. 4:19-21. However, SPB has not cited the *supreme court* opinion as support for its statement. Instead, SPB has cited the *court of appeal* decision that was *superseded* and depublished by the supreme court's grant of review. *See* id., *citing* 4 Cal.Rptr.3d at 292-93. *See also* Cal. Rules Ct. 8.1105(d)(1) [grant of review renders a court of appeal decision unpublished]. Under the California Rules of Court, an unpublished decision "must not be cited or relied on by a court or a party in any other action." Cal. Rules Ct. 8.1115.

Even a cursory reading of the supreme court decision in *Dept. of Personnel Administration* reveals that it addressed only a circumstance in which SPB's review had been wholly supplanted – a situation markedly different than that presented by the Receiver's proposal. The supreme court neither ruled upon nor even discussed whether the Legislature could authorize "alternatives" that "would . . . narrowly limit[] the SPB's role," even if SPB is not divested entirely of meaningful review. Whether or not that issue was discussed by the superseded court of appeal opinion is irrelevant; the supreme court did not address the question. A reported case is not authority for a proposition that is neither considered nor decided therein. *Aguilar v. Avis Rent A Car System, Inc.*, 21 Cal.4th 121, 143 (1999).

**3. SPB's arguments are belied by its own statutory and regulatory framework.**

In the end, SPB's claim that, under the State constitution, it "*must* review, in the *first* instance, state-employee discipline" rather than be relegated "to a perfunctory appellate function" proves too much. SPB's role *is* to serve an appellate function. *California Correctional Peace Officers' Ass'n, supra,* 10 Cal.4th at 1152-1153. As indicated above, it delegates its authority to ALJs if evidence is to be taken on a disciplinary appeal and limits its decision making to adopting, rejecting or modifying the proposed ALJ decision. Cal. Gov't Code § 19582; 2 Cal.

Code Regs. § 52. Its hearings are conducted without taking evidence, and those hearings are often very brief. *Fair Employment and Housing Comm'n, supra*, 39 Cal.3d at 433. Carried to its logical conclusion, SPB's argument would mean that the statutes permitting it to delegate evidentiary hearings to ALJs and its own practice of merely adopting, rejecting or modifying ALJ decisions would both be unlawful.

**4. Conclusion.**

Despite its expansive claims about the reach of its own authority, SPB's purposes are two: (1) to protect the merit principle in civil service; and, (2) to provide a forum for employee disciplinary appeals. The scope, nature and content of, and the procedures applicable to SPB's proceedings are all regulated by statute or rule. In fact, the Legislature may even enact legislation that overlaps to some extent with SPB's authority if such legislation serves to further other public policies, and especially if those other public policies are consistent with the merit principle in public employment. What the Legislature may not do is "wholly divest" SPB of its appellate function; SPB must retain some kind of meaningful review of employee disciplinary actions.

The Receiver's proposal does not encroach upon SPB's *constitutional* authority. In fact, his proposal preserves SPB's power to review the ultimate employment decision made concerning clinicians whose privileges have been revoked through peer review. His proposal furthers the important public policy of bringing the prison health care system into compliance with the federal Constitution. Like the State administrative agencies discussed above, the Receiver's proposal confers investigatory and adjudicatory authority over privileges to specialists with expertise in the particular area of practice. Furthermore, nothing that the Receiver has proposed is inconsistent with the merit principle that guides SPB actions. In fact, the peer review process proposed by the Receiver is a clear expression of the merit principle: only qualified, competent clinicians will be permitted to work in the prison health care system.

**B. The Receiver's Proposal Melds The Current, Duplicative And Ineffective Systems Of Peer Review And Employee Discipline Into A Single, Effective Peer Review Process That Provides Full Due Process Of Law To CDCR Clinicians.**

The current, ineffective peer review system exists independent of the civil service employee disciplinary appeal process. This "two track" procedure raises the specter of inconsistent results by separate decision makers and is unduly cumbersome. The Receiver's goal is to adopt a procedure whereby peer review and employment decisions will be expressly linked, while enforcing and respecting the due process rights of clinicians in the civil service. As discussed below, the Receiver's proposal achieves that goal.

**1. Summary of the law applicable to privileges and peer review.**

A full appreciation of the Receiver's proposal and the issues at stake on his Motion requires some explication of "privileges" and "peer review." Typically – at least in the private sector – clinicians must have "privileges" to be employed by hospitals or medical facilities. Receiver's Motion, p. 11:2-3. Thus, whether clinicians are given or retain such privileges is a key factor in their ability to earn a livelihood. As a result, physicians have historically been entitled to the protection of "fair procedures," including notice and a meaningful opportunity to be heard, before they could be denied admission to or expelled from a hospital or medical staff. *Anton v. San Antonio Community Hosp.*, 19 Cal.3d 802, 815, 827 (1977); *Ascherman v. San Francisco Medical Society*, 39 Cal.App.3d 623, 648 (1974). "Peer review" is the process by which medical professionals confidentially evaluate, through the analysis of particular cases, the competency of the care provided by one another. Findings of Fact and Conclusions of Law ("FFCL"), filed herein on October 3, 2005, p. 16:2-4.

Since privileges are conferred, revoked or terminated based on peer review, it follows that the quality and nature of the peer review process is central to the whether the physician has received "fair procedure." *See, e.g., Rhee v. El Camino Hosp. Dist.*, 201 Cal.App.3d 477, 488-489 (1988); *see also Yaqub v. Salinas Valley Memorial Healthcare System*, 122 Cal.App.4th 474 (2004).

Peer review and the concomitant procedural fairness required before a clinician in the

*private* sector loses privileges have largely been codified in California. *See* Cal. Bus. & Prof. Code §§ 805, 809 – 809.8.[5] Under the peer review statutes, the clinician is afforded a full panoply of procedural rights, including notice of the charges and the evidence on which they are based, a full evidentiary hearing before a neutral decision maker with expertise in the clinician's field, the right to call and cross-examine witnesses, the right to voir dire and challenge the decision maker, and the right to a written decision based upon and tied to the evidence before the tribunal. Bus. & Prof. Code §§ 809.1 – 809.4. Finally, an essential and unique attribute of the peer review process is that it is confidential. Section 1157(a) of the California Evidence Code prohibits discovery of the proceedings or the records of peer review committees and section 1157(b) protects any "person in attendance at a [peer review] meeting" from being "required to testify as to what transpired at that meeting."

Clinicians employed in the *public* sector are entitled to "constitutional due process" before their employment can be terminated (which, as discussed below, the Receiver's process provides). Cal. Bus. & Prof. Code § 809.7; *Kaiser Foundation Hospitals v. Superior Court*, 128 Cal.App.4th 85, 102 n.15. Nevertheless, the need for peer review in the prison health care system has long been apparent. As this Court itself stated more than a decade ago, "a primary component of a minimally acceptable correctional health care system is the implementation of procedures to review the quality of medical care being provided." *Madrid v. Gomez*, 889 F.Supp. 1146, 1258 (1995); *see also id.* at 1208-1210. No one, including SPB, disputes that peer review is essential to maintaining quality health care in the prisons. Receiver's Motion, p. 17:5-7.

**2. The current system provides an incompetent clinician "two bites at the apple" to challenge adverse actions, does not cull the incompetent from the ranks of CDCR employees and, therefore, is clearly interfering with the Receiver's remedial plans.**

Under the existing peer review and employee discipline system in the prisons, clinicians are subject to peer review by the Professional Practices Executive Committee ("PPEC") and have

[5] Congress enacted the Federal Health Care Quality Improvement Act of 1986 ("FHCQIA") (42 U.S.C. § 11101 *et seq.*) to govern peer review procedures. FHCQIA permits states to opt out from certain of its provisions. California is an "opt out" state. Cal. Bus. & Prof. Code § 809.

the right to challenge adverse privileging decisions before a tribunal that consists of a specially-trained ALJ assisted by a panel of three clinicians. However, a final decision ordering revocation of the clinician's privileges does *not* result in loss of employment because privileges are not a condition of physician employment in the State prisons. Thus, the clinician – though deemed incompetent through peer review – remains on the payroll, entitled to full salary and benefits. If CDCR wishes to remove the clinician from employment based on the conduct that gave rise to the adverse privileging decision, it must proceed through the State civil service process as if the peer review process had never occurred.

The current system thus permits the employee "two bites at the apple" based on the same conduct and is unduly time-consuming and expensive. The existing procedure raises at least the possibility of inconsistent determinations in the two forums based on the same underlying facts: a loss of privileges in the peer review process on the one hand, but no loss of employment as a result of the SPB proceedings, on the other. Indeed, the risk of inconsistent determinations is enhanced for at least two reasons, one legal and the other practical. First, as noted above, State law places constraints on the discovery of, or testimony concerning, peer review proceedings. Cal. Evid. Code § 1157(a), (b). In the subsequent disciplinary proceedings, the CDCR must re-litigate the very competency issues that have already been determined adversely to the clinician in the peer review proceedings. Second, SPB proceedings are conducted by generalist ALJs supplied by SPB who lack the expertise to make substantive determinations about clinical competency.[6]

An even more fundamental problem with the current system is that it does not effectively rid CDCR of incompetent or unqualified employees. This Court has recognized that continued employment of incompetent physicians is a major factor in the constitutional violations at issue. FFCL, pp. 7-17, 43. The failure of SPB's appeal process to sustain removal of an incompetent Medical Technical Assistant ("MTA") discussed in the Motion typifies the significant

[6] Undoubtedly there are many ALJs who can absorb and appreciate the difficult technical issues that likely arise in disputes over physician competency, but it cannot seriously be disputed that a panel of experts is better suited to determine whether one of their peers has violated the standard of care.

shortcomings of the existing process. The results in the MTA matter were not unusual. As the evidence submitted with this Reply demonstrates, SPB routinely reduces discipline that is both warranted by the facts and recommended by CDCR. Hagar Decl., ¶¶ 5 – 9 and Exhs. thereto. Such reductions in discipline are all the more troubling because CDCR is subject to an employee discipline matrix specifically approved by this Court in the *Madrid* litigation. Id., ¶ 4. Time and again, however, despite proof of the underlying facts warranting discipline, SPB has ignored the Court-approved matrix and has reduced the level of discipline. Id., ¶¶ 5 – 7.[7] It is bad enough that the incompetent cannot be fired; but this sort of structural inability to effect significant change in the workforce breeds cynicism among competent and hardworking employees, apathy and defeatism among management. *Cf.* FFCL, p. 15:20-27. If the Receiver is unable to remove incompetent clinicians, then his remedial efforts will largely have gone for naught. Hagar Decl., ¶ 9.

SPB's attempt to blame continued employment of the incompetent on "the prosecuting party's diligence, or lack thereof, in presenting an adequate case" is thus disingenuous at best. SPB Resp., p. 11:15-16. In addition to the fact that no sensible system of employee discipline should be dependent solely on the advocacy skills of the particular employer, the evidence establishes that the Receiver's criticism of the current disciplinary process is solidly grounded in experience. The process is badly broken and seems to be incapable of meting out appropriate sanctions to employees. Hagar Decl., ¶¶ 5 – 9. And, in light of the evidence submitted with this Reply, SPB's unwillingness even to acknowledge that its procedures might bear some responsibility for the failures in the prison health care system is proof positive of the "trained incapacity" this Court has so forcefully criticized. FFCL, p. 39.[8]

Even so, SPB's effort to rest responsibility for incompetency in the ranks of physicians on "poor case prosecution" actually supports the Receiver's arguments on this Motion: in a clinical

[7] And, as if to add insult to injury, the disciplinary process moves at a snail's pace. Hagar Decl., ¶¶ 12 – 14.

[8] In at least two other places in its opposition brief SPB blames "poor case prosecution" for the prison system's inability to rid itself of incompetent employees. *See* SPB Resp., pp. 7:27, 8:9. That SPB feels compelled to repeat this (unsubstantiated) allegation suggests the Receiver's indictment of the employee discipline system has hit a nerve and that SPB is protesting just a bit too much.

setting, where patient lives are literally at stake, a clinician's peers should be the first line of defense in ensuring the competency of those who are or remain employed. Whether unqualified and incompetent doctors may remain on the job and continue to put patients at risk should not be dependent upon dazzling displays of advocacy or upon SPB decisions made by the untutored or the merely politically well-connected.

**3. The Receiver's proposal eliminates the weaknesses in the current peer review system and does so in a manner consistent with the due process rights of physicians employed in the civil service.**

The Receiver's proposal is designed to address the flaws in the current system by expressly tying privileges to employment in the prison hospitals and by meshing features of both appeal processes into a single, more effective procedure.

**a. There is no dispute that privileges should be a condition of employment for physicians employed in the prisons.**

Because doctors in the prisons need not currently have privileges to remain employed, the Receiver requests an order that expressly makes privileges a requirement of continued employment. Receiver's Motion, p. 20. No one questions that privileging and continued employment should be tied to one another. Incompetent clinicians not only put patients at continued, serious risk, they are an unnecessary financial drain on the State's coffers. Receiver's Motion, p. 11, n. 5 and Exh. 2 thereto.

At one point, even SPB's Chief Counsel recognized that it is reasonable and sensible for privileges to be a condition of continued employment in the prisons. *See* Exh. 4 to Receiver's Motion, p. 2; Declaration of Linda Buzzini ("Buzzini Decl."), filed herewith, ¶ 5(a). Almost a year ago, SPB's counsel suggested that SPB could change the specifications and minimum qualifications for civil service physicians to include retention of privileges as a condition of employment. Exh. 4 to Receiver's Motion, p. 2. Had SPB followed through on its counsel's suggestion, loss of privileges would automatically result in loss of employment as a "non-punitive" or "non-cause" termination under State law. *See* Cal. Gov't Code §§ 19585(d), (h). In such a non-punitive termination the employee's appeal rights are severely limited and, under

SPB's own rules, the employer has no obligation to justify the termination. *In re George Lannes*, SPB Decision 92-10 (attached as Exh. 1 to Buzzini Decl.).[9] Unfortunately, SPB reversed field and decided that, rather than implement its counsel's suggestion, doing nothing was the best option. Buzzini Decl., ¶ 8.

In the absence of SPB action, the Receiver has endeavored to craft a procedure that links privileges and continued employment, while carrying out the intent of the peer review procedures found in Cal. Bus. & Prof. Code § 809.1 *et seq.* Significantly, UAPD worked with the Receiver to develop the proposal and generally supports the Receiver's view that privileges should be a condition of continued employment. Receiver's Motion, pp. 14-15; Brief of Amicus Curiae Union of American Physicians & Dentists ("UAPD Brief"), filed herein on May 22, 2007, pp. 1-2. Surely if the proposal was damaging to clinician rights, UAPD would be complaining loudly.

**b. The Receiver's proposal provides full due process to physicians subject to adverse privileging and employment actions.**

SPB suggests that the Receiver's proposal fails to protect the procedural due process rights of clinicians employed by CDCR. Any fair reading of the Receiver's proposed procedure demonstrates that it easily passes constitutional muster under the Due Process Clause of the Fourteenth Amendment.

The "root requirement" of the Due Process Clause is "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). The hearing should be held before an impartial body or officer, but that does not mean that the investigatory and adjudicatory functions necessarily must be separated. *See Hortonville Jt. Sch. Dist., No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482 (1976); *Withrow v. Larkin*, 421 U.S. 35 (1975); *Rhee, supra*, 201 Cal.App.3d at 490. What is required, and what the Receiver's process ensures, is that doctors who have suffered adverse privileging and employment decisions "will be given the chance to tell [their]

[9] An employee has no right to appeal a non-punitive termination to SPB under art. VII, § 3(a). *Cf.* Cal. Gov't Code § 19585(h) (providing that non-cause terminations are not "disciplinary" for purposes of Civil Service Act). Thus, the appellate rights in such a case are purely statutory. Cal. Gov't Code § 19585(f).

side of the story, and that the agency [is] willing to listen." *Ryan v. Illinois Dept. of Children and Fam. Services*, 185 F.3d 751, 762 (7th Cir. 1999).

Under the Receiver's proposal, PPEC will make proposed final decisions regarding privileges and continued employment and submit those to the Governing Body. The Governing Body will include, among others, the Receiver's Chief Medical Officer. The Governing Body will issue a notice pertaining to both privileges and continued employment. The clinician will be afforded pre-deprivation notice and hearing. If the employment decision is upheld after the *Skelly* process, the doctor may appeal and receive an evidentiary hearing on both the competency and employment decisions before a specially-trained ALJ supplied by OAH. The ALJ will be assisted by a panel of three physicians who will be subject to voir dire and challenge by the physician. The committee of physicians will make findings of fact and render a decision on the ultimate issues, based on the evidence introduced at the hearing. Either party may appeal the employment determination to the full SPB.

From a *due process* perspective, there is nothing about the Receiver's proposal that differs materially from the procedures SPB currently follows. The Receiver's proposal adopts all of the procedural steps of the current disciplinary process and incorporates peer review "fair procedure" as well. The only significant difference from the current "two track" peer review/disciplinary procedure is that the Receiver's proposal collapses two evidentiary hearings into one. Surely SPB would not argue that the Due Process Clause entitles a clinician to two evidentiary hearings when one will suffice. As UAPD – the union charged with the responsibility of protecting CDCR physicians' rights – wrote in its brief in connection with this matter:

> [T]he [Receiver's] Policy represents a significant improvement over CDCR's existing 'peer review' system and State Personnel Board review of disciplinary actions involving clinical practice. The Policy provides physicians with the due process protections to which they are entitled and ensures that allegations of clinical misconduct are ultimately judged by an unbiased body of physicians, many of whom will have experience with correctional medicine.

UAPD Brief, pp. 1:25 – 2:4.

The Receiver could not have said it better.

**c. SPB's criticisms of the Receiver's process are unfounded.**

The remaining criticisms leveled at the Receiver's proposal by SPB are easily addressed.

The most serious – if entirely unsubstantiated – charge that SPB makes is that peer review determinations under the Receiver's procedure will be biased, and therefore violate employee rights. SPB Resp., pp. 12-13. Perhaps the best answer to this charge is that UAPD believes that decisions affecting its members under the Receiver's proposal will be "unbiased" and the procedure will provide "due process protections" to clinicians. UAPD Brief, p. 2:2-3. Suffice it to say that there is nothing whatsoever in the Receiver's proposal that even hints that peer review determinations will be biased against the clinician. To the contrary, the procedure crafted by the Receiver has multiple layers of review to ensure that any adverse peer review and employment decision has been arrived at only after careful consideration.

SPB also seems to think that its ALJs are better equipped than ALJs employed elsewhere in State service to handle peer review-related appeals. SPB Resp., pp. 2-3, 5-6. SPB has not always held this view. As late as February of this year, SPB indicated a willingness to permit hearings involving privileging and employment to be conducted by specially-trained ALJs appointed by OAH, just as the Receiver has proposed. *See* Buzzini Decl., ¶ 8 and Exh. 2 thereto. But, as with SPB's counsel's original suggestion to make privileging a condition of employment, SPB ultimately decided that, from its perspective, doing nothing was the better option. Id., ¶ 11.

Even so, the issue is not just whether ALJs employed by SPB or by OAH are necessarily better qualified; the issue is whether decisions regarding clinical competency should be left solely to those schooled in the law, rather than to those schooled in medicine. Peer review says, rightly, that professionals are best qualified to opine on the competency of other professionals. The Receiver agrees and has endeavored to incorporate the peer review hearing process into the employment appeals process for doctors employed by CDCR.

Finally, SPB professes great puzzlement over that element of the Receiver's proposal pursuant to which the ALJ in the evidentiary hearing will be limited to ruling on questions of law and procedure, and the three-clinician panel will make findings of fact and reach the ultimate

determination as to privileging (and thus employment). SPB Resp., p. 13:3-8. *See* Exh. 3 to Receiver's Motion, pp. 24-25. There is no reason for SPB's confusion. The Receiver's proposal is not all that different from the division of roles between judges and juries.[10]

At bottom, SPB just seems offended that the Receiver has constructed a procedure that SPB believes reduces the centrality of it and its hearing officers. But hurt feelings are hardly a reason to continue to use a process that is procedurally inferior and which cannot ensure that incompetent clinicians are removed from employment in the prisons.

**C. SPB's Proposed "Less Intrusive Alternative" Is Not A Meaningful Or Effective Alternative.**

SPB contends that the Receiver "made no effort" to explore with SPB alternatives to his proposal. SPB Resp., p. 15:2. This statement is simply false. In his Motion, the Receiver described the many meetings and communications his staff had with SPB regarding this matter in the year prior to filing his Motion. Motion, pp. 13-15. The Receiver has submitted additional evidence with this Reply to demonstrate the repeated and tireless efforts that his staff made to construct a proposal acceptable both to the Receiver and to SPB. Buzzini Decl., ¶¶ 3 – 11. Despite early hopeful signs that something could be worked out, SPB opted in the end for the status quo. Id., ¶ 11.

The failure of imagination that SPB exhibited after all those months of meetings is similarly reflected in the "less intrusive alternative" which it has attached to its opposition brief. If SPB's proposal is "less intrusive," that is because it is *not* an alternative. The core failing of SPB's "alternative" is the same core failing of the existing system: a revocation of privileges does not, of itself, require removal from employment by the CDCR. Instead, just as under the current regime, the doctor remains an employee, entitled to full salary and benefits pending the SPB appeal process, and is potentially subject to reinstatement, notwithstanding the adverse privileging determination. SPB's "alternative" makes clear, therefore, that in its lexicon "less intrusive" means "nothing changes."

[10] Use of the panel of experts is also very similar to the procedure in the statutory peer review process. *See* Cal. Bus. & Prof. Code § 809.2.

## CONCLUSION

The Receiver submits that his peer review and disciplinary proposal is procedurally superior to the current "two track" system, and serves the salutary purposes of ensuring meaningful and effective peer review and enhancing patient safety, while protecting the due process rights of the clinician. The Court should grant his motion for a waiver of State law regarding clinical competency determinations.

Dated: June 15, 2007

FUTTERMAN & DUPREE LLP

By: /s/
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies as follows:

I am an employee of the law firm of Futterman & Dupree LLP, 160 Sansome Street, 17th Floor, San Francisco, CA 94104. I am over the age of 18 and not a party to the within action.

I am readily familiar with the business practice of Futterman & Dupree, LLP for the collection and processing of correspondence.

On June 15, 2007, I served a copy of the following document(s):

**RECEIVER'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR WAIVER OF STATE LAW RE CLINICAL COMPETENCY DETERMINATIONS**

by placing true copies thereof enclosed in sealed envelopes, for collection and service pursuant to the ordinary business practice of this office in the manner and/or manners described below to each of the parties herein and addressed as follows:

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